FILED
MAY 9 1951

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 731

RED BALL MOTOR FREIGHT, INC., ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

MOTION OF HERRIN TRANSPORTATION COMPANY TO AFFIRM

CARL L. PHINNEY,
Counsel for Appellee,
Herrin Transportation Company.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 2004

RED BALL MOTOR FREIGHT, INC., ET AL.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, ET AL.,
Defendants

MOTION TO AFFIRM

Appellee, Herrin Transportation Company, pursuant to Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment of the District Court be affirmed.

This is a direct appeal from the final judgment, entered on February 7, 1951, by a District Court of three judges especially constituted pursuant to 28 USC 1253, 2284 and 2385, dismissing Appellants' complaint which sought to set aside an Order of the Interstate Commerce Commission. Appeal was allowed March 28, 1951 and appeal papers were served on the attorney for Appellee, Herrin Transportation Company, on March 31, 1951. The Court granted extension of time to Appellee, Herrin Transportation Company, until April 23, 1951 to file this Motion to Affirm.

By an Application filed December 22, 1947, Herrin Transportation Company, a Texas Corporation, one of the Appellees herein and for convenience hereafter called Herrin, sought a Certificate of Public Convenience and Necessity, authorizing operations as a common carrier by motor vehicle in interstate or foreign commerce of general commodities, with exceptions, serving Lufkin, Texas as an intermediate point, in connection with its authorized regular route between Corsicana, Texas and DeRidder, Louisiana. The Application was set down for hearing before an Examiner, and at the hearing several motor carriers and one railroad company opposed the granting of the Application. In addition to the Appellants, Red Ball Motor Freight, Inc., D. C. Hall Transport, Inc. and East Texas Motor Freight Lines, the following carriers, who are not parties to this suit, also protested the granting of the Application: Southwestern Transportation Company, T. S. C. Motor Freight Lines, Inc., The Texas and Pacific Motor Transportation Company and The Texas and Pacific Railroad Company. At the time of the filing of this Application, Herrin Transportation Company was, and is now, authorized to operate among other routes between Houston, Texas and Shreveport, Louisiana via Lufkin, serving Lufkin as an intermediate point. In addition to the above, it is authorized to serve between Dallas, Texas and DeRidder, Louisiana, and between Shreveport, Louisiana and DeRidder, Louisiana. Herrin is authorized to transport, as a common carrier by motor vehicle, general commodities over numerous regular routes in Texas and Louisiana. The routes pertinent to this proceeding are:

(a) Between Houston, Texas and Shreveport, Louisiana

(b) Between Dallas, Texas and DeRidder, Louisiana

(c) Between Shreveport, Louisiana and DeRidder Louisiana

Routes (a) and (b) intersect each other at Lufkin, Texas which is an intermediate point on the Houston-Shreveport route, but is not an intermediate point on the Dallas-DeRidder route. Herrin was authorized to operate between Lufkin, Texas and Shreveport, Louisiana and between Lufkin, Texas and Houston, Texas, but because Lufkin was not an intermediate point on route (b), the Dallas-DeRidder route, Herrin could not carry goods direct between DeRidder and Lufkin, but would have to transport from DeRidder to Shreveport and from Shreveport to Lufkin. For the identical reason on shipments between Dallas and Shreveport Herrin could not serve Shreveport via Lufkin but had to transport via DeRidder to Shreveport. The Application for the Certificate involved in this proceeding was filed simply for the purpose of making Lufkin an intermediate point on its east-west route (b) as hereinabove set out.

A public hearing was held on June 18, 1948 and the Orders, Reports and Certificate were issued by the Interstate Commerce Commission to which exceptions, replies and petitions for reconsideration were filed by the parties, and as a result, the Commission issued a Certificate of Public Convenience and Necessity to Herrin to serve Lufkin as an intermediate point.

When Herrin secured a Certificate of Public Convenience and Necessity authorizing service to Lufkin as an intermediate point on its Dallas-DeRidder route, it enabled the shipping public to receive a direct, overnight service between New Orleans and DeRidder, Louisiana and Lufkin, Texas. The testimony was undisputed before the Interstate Commerce Commission and the Commission so found that:

> "Services of Herrin and T.S.C. are being utilized. The traffic is being interchanged at either Houston or Shreveport. At least two days' transit time is required on this traffic. The shippers are primarily interested

> in a faster service and the overnight, direct service proposed by Applicant is desired".

It, therefore, was apparent from the uncontroverted testimony before the Commission that on shipments between New Orleans, Louisiana and Lufkin, Texas and DeRidder, Louisiana and Lufkin, Texas also required about 48 hours by reason of the interchange at either Houston or Shreveport, and that the granting of this Application would shorten Herrin's time by enabling it to bring shipments direct from New Orleans and DeRidder, Louisiana into Lufkin, Texas. The same would be equally true on services in the reverse direction. The Commission's Order is not attacked in this connection.

Appellants strongly stress the Dallas-Shreveport traffic. As was previously pointed out, Herrin rendered an overnight service between Dallas, Texas and Shreveport, Louisiana via DeRidder, a distance of 454 miles, and the granting of the Certificate permitted Herrin to render substantially the same service, but would enable it to save approximately 148 miles. The Commission found that D. C. Hall's operation between Dallas, Texas and Shreveport, Louisiana, over U. S. Highway 80, was approximately 5½ hours and distance travelled of 185 miles. Red Ball Motor Freight, Inc. operates between Dallas and Shreveport in approximately 5½ hours and traverses about 220 miles. East Texas Motor Freight Lines operates between Dallas and Shreveport in about 6 hours and operates over about 185 miles. The Commission found that:

> "Herrin was able to compete fully with short route carriers in spite of the longer distance, and that the granting of Lufkin as an intermediate point would enable Herrin to handle this traffic on a more convenient and economical basis"

but would not materially enhance its present competitive position. The Interstate Commerce Commission found:

> "Where, as here, an Applicant is operating over a particular route, service at intermediate points, without restriction, is normal and generally in the interest of the public and we believe should be authorized where sought, except where there is a compelling reason for denial. Such reason is not here present. Authorization to serve the sought intermediate point in the instant proceeding will result in supplying a need for prompt and efficient service to the public, and in permitting a more efficient and more economical use of its facilities by Applicant. The latter also results in indirect benefits to the public.
>
> In view of the above discussion, we concur that a need has been established for the proposed service and that any diversion of traffic from the opposing carriers which, in any event, would not appear to be substantial, will be more than compensated by benefits to the public".

The District Court held that it was adequate evidence to support the Commission's finding that public convenience and necessity requires service by Herrin from and to Lufkin as an intermediate point on its Dallas-DeRidder route, and that the Commission's finding did not constitute an abuse of the discretion vested in it with respect to such a determination. (District Judge Dooley dissented).

Throughout these proceedings appellants have strongly urged that the Commission was in error in not requiring Herrin to prove convenience and necessity between Dallas and Shreveport. Conceivably there could be no justification whatever for the Commission to require any testimony on convenience and necessity between Dallas, Texas and Shreveport, Louisiana for the reason that Appellee, Herrin Transportation Company, already has that authority under existing Certificates of Public Convenience and Necessity

issued by the Interstate Commerce Commission by virtue of its operations to Dallas to Corsicana to DeRidder to Shreveport. The Interstate Commerce Commission made a finding as follows:

> "As stated, Applicant is presently affording overnight service between Dallas and Shreveport, via DeRidder, a distance of about 454 miles. Despite the circuity of this route, Applicant appears to be able to compete effectively with short route carriers by using Lufkin as an intermediate point (which affords it a saving of 148 miles). Applicant would still give only an overnight service. It would, however, be in a position to conduct its operations between Dallas and Shreveport on a more convenient and economical basis. It is not apparent that operations via Lufkin would necessarily or materially enhance applicant's present competitive position with the opposing carriers."[1]

---

[1] Mr. A. E. Daigle, General Manager of Herrin, testified (Transcript 25):

Q. What is your running time between Dallas and Shreveport at the present time?

A. Well, between Dallas and Shreveport, the running time I would say is approximately 14 hours.

Q. 14 hours?

A. Yes.

Q. What time does your truck ordinarily leave Dallas destined for Shreveport?

A. Well, ordinarily on the loads he may leave at 2:00 o'clock in the afternoon, or 3:00 in the afternoon.

Mr. J. R. Warden, Chief Clerk of one of the short route carriers which opposed Herrin's application in the hearing before the Commission, testified (Transcript 142-143):

Q. Do you consider the service of Herrin Transportation Company between Dallas and Shreveport competitive with the service performed by your companies?

A. It would be competitive, yes sir.

Q. (By Exam. Borroughs) Is it competitive now? That is your question.

A. (Mr. Hutchinson) Yes sir.

Q. (By Mr. Hutchinson) Do you consider it competitive at the present time over the routes they are presently operating?

A. Yes, sir, I think it is competitive.

As is pointed out in footnote 1, there is substantial evidence in the record that Herrin was an effective competitor on traffic moving between Dallas and Shreveport via DeRidder.

It is respectfully submitted that the action of the Commission in the grant of authority to Herrin was well within its statutory authority. We quote from the following opinion, *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 241:

> "The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies"

That a court may not set aside the order of a fact finding administrative body, acting within the field of its designated power, unless such order is unsupported by evidence or is illegal or capricious, is well established.

> "The purpose of Congress was to leave the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity * * * this of course gives administrative discretion to the Commission * * * to draw its conclusions." 283 U. S. 35, *Chesapeake & Ohio Railway Co.* vs. *United States*, 300 U. S. 276-287, *Powell* vs. *United States, McLean Trucking Co.* vs. *United States*, 321 U. S. 67.
>
> "Unless in some specific respect there has been prejudicial departure from requirements of the law, or abuse of the Commission's discretion, the reviewing

court is without authority to intervene. It cannot substitute its own view concerning what should be done." *United States* vs. *Pierce Auto Line,* 327 U. S. 515-536.

For the foregoing reasons, we submit that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

CARL L. PHINNEY,
Attorney for Appellee,
Herrin Transportation Company.

(4736)